

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 02-0307
Gross Retail & Use Tax
For Years 1998, 1999, 2000

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Gross Retail and Use Taxes—Business Assets

Authority: IC § 6-8.1-5-1(b); IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-4; IC § 6-2.5-3-6; IC § 6-2.5-3-7; 45 IAC 15-5-3(8); 45 IAC 2.2-2-1; 45 IAC 2.2-3-4; *Tri-States Double Cola Bottling Company v. Department of State Revenue*, 706 N.E.2d 282 (Ind.Tax 1999)

Taxpayer protests the assessment of use tax on assets purchased for the business where allegedly no gross retail tax was paid at the point of purchase.

II. Penalty—Request for Waiver

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the imposition of the 10% negligence penalty and requests a waiver.

STATEMENT OF FACTS

Taxpayer is a Chinese restaurant offering buffet, menu, and carryout services. Ms. X is the owner and sole shareholder of the corporation. Ms. X engaged the services of a general contractor to renovate an existing building in order to open her business in November of 1998. The general contractor engaged the services of several different businesses to perform the work required. The audit determined that since gross retail tax had not been collected and remitted at the point of purchase of a number of items, taxpayer, owed use tax to the State of Indiana. Additional facts will be supplied as required.

I. Gross Retail and Use Tax—Business assets

DISCUSSION

Taxpayer protests the use tax assessment on assets purchased in order to open a Chinese restaurant where buffet, menu, and carryout services would be available to customers. Taxpayer entered into a contract with a general contractor who used subcontractors to provide materials and services to complete the refurbishing of the building in which the restaurant now resides. Invoices for these items were sent directly to taxpayer. Neither the general contractor nor subcontractors collected and remitted to the State of Indiana gross retail taxes on many items used in renovating the building space for the business. Taxpayer's owner must now pay use tax on these items, four of which are at issue in this protest: a sign purchased from a sign company not registered to collect Indiana gross retail and use tax in 1998; fixtures where the auditor agreed the freight charges were not subject to tax, but the actual purchases were; a carpet sold to taxpayer by a company that was already out of business at the time of the audit; a sound system installed by a Kentucky company (not registered in Indiana to collect and remit Indiana gross retail and use tax) which collected gross retail tax but remitted the amount to the state of Kentucky, not the state of Indiana. Taxpayer also protested an uncredited utility exemption for use of natural gas in food preparation; the audit made that adjustment, as well as the adjustment for the freight charges for the sign. These two adjustments still stand.

Pursuant to IC § 6-8.1-5-1(b) and 45 IAC 15-5-3(8), a "notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the assessment is made." Pursuant to IC § 6-2.5-2-1, a "person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state." *See also*, 45 IAC 2.2-2-1. Pursuant to IC §§ 6-2.5-3-1 through 6-2.5-3-7, an "excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction." An exemption is provide in IC § 6-2.5-3-4 if "the property was acquired in a retail transaction and the state gross retail tax" was paid at the time of purchase. Taxpayers are personally liable for the tax. (IC § 6-2.5-3-6). IC § 6-2.5-3-7 provides that a "person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana;" therefore, the presumption of taxability exists until rebutted. *See also*, 45 IAC 2.2-3-4.

Taxpayer did not provide sufficient evidence that the State's gross retail tax was paid by her to the providers of the equipment at issue. The issue in this case is really whether such taxes were collected and remitted to the State of Indiana. If not, taxpayer remains liable for use tax on taxable items where no retail tax has been collected and remitted. *See, Tri-States Double Cola Bottling Co. v. Department of Revenue*, 706 N.E.2d 282, at 286-287.

FINDING

Taxpayer's protest concerning the assessment of use tax on assets purchased for the business, where it cannot be shown that gross retail tax was collected and remitted by authorized retail merchants at the time of purchase, is denied.

I. Penalty—Request for waiver

DISCUSSION

Taxpayer protests the imposition of the 10% negligence penalty on the entire assessment. Taxpayer argues that it had reasonable cause for failing to pay the appropriate amount of tax due. Taxpayer stated at the hearing that she totally relied on the expertise of her CPA, and that her failure to pay the proper amount of tax was due to his advice and his interpretations of Indiana's statutes, regulations, and case law.

Indiana Code Section 6-8.1-10-2.1(d) states that if a taxpayer subject to the negligence penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit taxes held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty. Indiana Administrative Code, Title 45, Rule 15, section 11-2 defines negligence as the failure to use reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence results from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by Indiana's tax statutes and administrative regulations.

In order for the Department to waive the negligence penalty, taxpayer must prove that its failure to pay the full amount of tax due was due to reasonable cause. Taxpayer may establish reasonable cause by "demonstrat[ing] that it exercised ordinary business care and prudence in carrying or failing to carry out a duty giving rise to the penalty imposed. . . ." In determining whether reasonable cause existed, the Department may consider the nature of the tax involved, previous judicial precedents, previous department instructions, and previous audits.

Taxpayer has not set forth a basis whereby the Department could conclude taxpayer exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer. Therefore, given the totality of all the circumstances, waiver of the penalty on the entire assessment is inappropriate in this particular instance.

FINDING

Taxpayer's protest concerning the proposed assessment of the 10% negligence penalty is denied.